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BLEED THROUGH-

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL.
JOSEPH ACCARDI, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 18–29) are reported at 206 F. 2d 897.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1953 (R. 30). The petition for a writ of certiorari was filed on September 23, 1953, and granted on November 16, 1953. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether issues of fact requiring a hearing were raised by a petition for habeas corpus which attacked the validity of the denial of petitioner's application for the discretionary relief of suspension of deportation, alleging on information and belief that the case had been prejudged and decided on matters outside the record by the Board of Immigration Appeals, where that decision on its face was based on the facts of record and previous recommendations adverse to petitioner had been made on the facts of record before the acts alleged to show prejudgment had occurred.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 52–59.

STATEMENT

In a second petition for habeas corpus, petitioner, after he had been taken into custody for deportation, attacked the validity of the denial of his application for suspension of deportation (R. 2–5). Petitioner admittedly entered the United States illegally in 1932, without immigration inspection and without an immigration visa, and his deportability on these grounds is not con-

tested (I. R. 5, 8).[1] The petition for habeas corpus thus relates only to the denial of the discretionary relief in the form of suspension of deportation which the Attorney General is authorized to grant subject to approval by Congress.

In the District Court, the respondent filed an affidavit in opposition to the granting of the petition for a writ of habeas corpus, and annexed thereto a copy of the immigration file in petitioner's case (R. 5–8). From that file the following facts appear (see note 1, *supra*):

Petitioner was convicted in 1941 of conspiring to defraud the United States during a period beginning about two years after his entry (I. R. 14, 15, 209). Deportation proceedings against petitioner were instituted in 1947 on the ground that he had entered illegally (I. R. 3, 186). In 1948, petitioner applied for suspension of deportation, claiming that his departure would result in serious economic detriment to his father (I. R. 205–207).

Following the decision of this Court in *Sung v. McGrath,* 339 U. S. 33, the proceedings begun in 1947 were reopened and a new hearing was held in August, 1951 (I. R. 4, 121). At the con-

[1] We have numbered in pencil on the lower left-hand side of the pages the immigration file in petitioner's case, which was before the courts below and is lodged with the Clerk of this Court. References to this file will be designated as "I. R.". "R." refers to the printed record.

clusion of the new hearing, the hearing officer found petitioner deportable on the basis of his illegal entry (I. R. 4, 159, 164). The hearing officer also considered petitioner's application for suspension of deportation, founded by then on the claim that deportation would result in economic hardship to his legally resident alien wife whom he had married in 1949 and to the child they were expecting in October, 1951. The hearing officer found as follows (I. R. 160):

> The respondent testified that he pays $50.00 a month for rent of an apartment in the apartment house where he now resides. He receives $100.00 a month as caretaker of the apartment house. He also receives $50.00 a month plus dividends from property owned by him and another person. The record is silent as to the amount of the dividend. The respondent stated his assets consist of about thirty per cent stock in the TEAC Homes Company, which property is valued at about $5,000.00. The other stockholders in this company are the respondent's brother and his wife, and another person. The respondent also owns one-half interest in a piece of property which he says is worth about $3,000.00 at today's real estate value. Respondent and his wife own a 243 acre farm on which there is a house, farm building, livestock, and farm machinery having a total value of $32,000.00 on which $10,000 was paid in

cash. He places his total assets at between $40,000.00 and $50,00.00.

The hearing officer found that "careful consideration of the evidence adduced during the hearing is not sufficiently convincing to satisfactorily indicate source of income of the respondent, nor the total amount of such income." He concluded "that the evidence does not justify or warrant the granting of any discretionary relief in this case." (I. R. 160.)

At petitioner's request, on January 28, 1952, the hearings were ordered reopened to permit him to produce witnesses and documentary proof of his assets and liabilities (I. R. 4, 22). Additional hearings were held on April 16 and April 30, 1952 (I. R. 23, 60). Petitioner did not produce an accountant's statement of his assets and liabilities, claiming that the statement had not been prepared because of the death of the accountant's father. The hearing officer ruled that petitioner had had ample time to have the statement prepared and declined further to adjourn the hearings. Petitioner did, however, testify himself at the adjourned hearings, and there claimed that his assets amounted only to about $15,000 to $20,000. (I. R. 22, 28, 62–64, 65, 110.) On May 15, 1952, the hearing officer again recommended that suspension of deportation be denied (I. R. 22). He pointed out that, although petitioner testified that since 1941 he had supported his

78-year old father and in his income tax returns since 1946 had claimed his father as a dependent, and although the father had testified in 1948, in connection with petitioner's application for suspension of deportation at that time, that the father had no assets, the evidence showed that during the years 1943 and 1944, the father had made gifts to Theresa Accardi (the wife of petitioner's brother) totaling more than $50,000. (I. R. 20, 52–53, 114.)

In his exceptions to the hearing officer's decision, petitioner wrote (I. R. 163):

> That it is acknowledged that relief from deportation is not a right of any applicant but is a matter of discretion within the province of the Attorney General and to be exercised by him, and that he may consider evidence and information which may not be of record in order to properly arrive at a decision upon an action for discretionary relief. However, no evidence presented, including certain reports of officers of the Immigration and Naturalization Service, over the course of three years, relative to outside investigations, has been detrimental to the respondent.

On July 7, 1952, the Assistant Commissioner denied suspension of deportation, pointing out the discrepancy as to the father's assets and the doubts as to petitioner's sources of income. He concluded that "In view of all the circumstances regarding his sources of income, his assets, and

his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case * * *." (I. R. 14–17.)

On April 3, 1953, the Board of Immigration Appeals concurred in the denial of the application for relief (I. R. 10–12). The opinion summarizes the facts of record, including the following facts with respect to petitioner's income (I. R. 11):

> The respondent alleges that he is worth between $15,000 and $20,000 (p. 22–r). Evidentiary data in the record is to the effect that the subject has been engaged in the sale or transfer of real estate and has received some income in the nature of commissions on the sales. The alien has testified that he is part owner of certain properties some of which he is trying to sell. He also owns a farm equipped with machinery and stocked with livestock, worth about $40,000. He receives a salary of $130 per month for collecting rents for his sister-in-law and about $100 per month for collecting rents on other properties.[2]

The Board concluded: "After consideration of all

[2] The opinion also states:

"This respondent has been arrested on several occasions between 1933 and 1940 or 1941. He was arrested in 1933 and charged with being a disorderly person; in 1934 for possession of lottery chips and violation of the liquor laws, respectively; and in 1940–1941 for conspiracy to defraud the United States which acts were committed between 1934 and 1937." (I. R. 11.)

the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion." (I. R. 12.)

The District Court in an order of May 15, 1953, dismissed petitioner's first application for a writ of habeas corpus to review the Board's denial of discretionary relief. In its memorandum opinion the court held: "A review of the record as a whole, fails to demonstrate that there was present a clear abuse of discretion or a clear failure to exercise discretion. Absent either element this court cannot review the exercise of discretion by the Board of Immigration Appeals."

In the second petition for habeas corpus, the one here involved, filed by petitioner's wife on his behalf, it was alleged that the denial of discretionary relief was invalid for the reason that, on information and belief, the Attorney General, on October 2, 1952, had prepared a confidential list of persons to be deported on which petitioner's name was included. The petition alleged that because of this "and because of consideration of matters outside the record of his immigration hearing," the Board of Immigration Appeals denied petitioner's application for discretionary relief. There was also an offer to show that in all similar cases, aliens had been granted discretionary relief. (R. 2–5.) In a sworn affidavit submitted in opposition to the application for the issuance of the writ, an Assistant United

States Attorney denied that petitioner's case had been prejudged or that the case had been considered on evidence outside the record. He also pointed out that petitioner's first application for a writ had been sued out on the eve of his scheduled departure and that the second writ was sued out just before the petitioner was scheduled for deportation on May 19, 1953 (R. 5–8).

The District Court declined to issue the writ (R. 2), and the Court of Appeals, Judge Frank dissenting, affirmed the order of the District Court (R. 30). The majority of the court below pointed out that all decisions in the case adverse to petitioner except the decision of the Board of Immigration Appeals had been rendered before the statement of the Attorney General on which the petition was based; that the opinion of the Board of Immigration Appeals "discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation" (R. 22). The majority concluded that "the assertion of a mere suspicion or 'belief' that the Board considered other matters did not require the issuance of a second writ. Were this enough, every deportable alien would so allege, merely to delay his justifiable deportation." (R. 23.) The majority were also of the view that the allegations of the petition that "in all similar cases" the Board had exercised its discretion in favor of deportable aliens

convicted of crime was completely without merit since "determination of what weight to give to a prior conviction of crime necessarily depends upon the circumstances of the particular case. No two cases can be precisely similar." (R. 23.)

SUMMARY OF ARGUMENT

Admittedly deportable, petitioner sought the suspension of deportation the Attorney General has discretion to grant. It is only the denial of this discretionary relief which was in issue. The case turns on the allegation that in October, 1952—after a hearing officer had recommended, and the Assistant Commissioner had decided, that suspension of deportation should be denied, but before the Board of Immigration Appeals reached the same conclusion—the Attorney General announced a drive to deport undesirable aliens, including petitioner, who were here illegally. On this basis, and because statements emanating from the Department of Justice after the Board's decision in April, 1953, described petitioner as a racketeer and an undesirable, petitioner alleged that his application was prejudged on matters outside the administrative record. We submit that the courts below properly refused to review or revise the exercise of the Attorney General's discretion.

I

Congress provided that where a deportable alien meets the statutory conditions precedent the

Attorney General "may"—not "must"—grant suspension of deportation. The statutory language, the legislative history, and the consistent interpretations of Congress and the courts leave no doubt that this discretionary power is a matter of grace, like the pardoning power. If its exercise is reviewable at all, it is only for failure to exercise discretion or for the clearest abuse. No such ground is present here.

II

The general allegation that matters outside the record had been considered rests ultimately on the speculative assertion that, because the Attorney General performed his duty of prosecuting deportation proceedings against him, petitioner could not receive the benefit of a discretionary determination as to whether his deportation should be suspended. On this record, at least, the allegation posed no issue warranting a hearing. Moreover, reliance by the Attorney General in exercising his discretion on matters outside the record would not in any event invalidate the administrative decision.

A. The hearing officer and the Assistant Commissioner, whose decisions were rendered before the October, 1952, statement of the Attorney General on which petitioner's case rests, decided on the record that suspension of deportation was unwarranted. Though its ruling followed the October statement, the Board of Immigration Ap-

peals, agreeing with the two prior judgments, also referred only to the record. And the record amply justified the conclusion that petitioner was unworthy of suspension of deportation.

On the other hand, petitioner's allegation that outside matters were considered by the Board rested, in the last analysis, on the fact that the Department of Justice (as is its duty) prosecuted the deportation proceeding against him and that his case was considered important within the Department in the belief that he was a racketeer. The inference rests on the premise that the Attorney General cannot be trusted both to prosecute deportation proceedings and to determine in his discretion whether suspension of deportation should be granted. The premise is faulty, however; Congress, in a judgment which is not open to revision here, conferred both functions on the Attorney General.

Once this is acknowledged, petitioner's case falls. For his controverted allegations on information and belief come down to the conjecture that, because the proceedings against him were brought under the Attorney General and expedited in the belief that he was an undesirable alien, the Board of Immigration Appeals must have acted on this belief in denying suspension of deportation. Petitioner calls, then, for examination of the mental state of the Board—and perhaps of the Attorney General, who, petitioner says, has peculiar knowledge of the facts alleged—

to determine whether this matter outside the record accounts for the decision. Such an inquiry into the process of administrative judgment could scarcely ever be justified. Cf. *United States* v. *Morgan,* 313 U. S. 409, 421–422. Here, considering the nature of the allegations, the character of the discretionary decision involved, and the entire adequacy of the administrative record alone to support the decision, the probe petitioner sought in further delay of his long-delayed deportation was properly denied.

B. The statute giving the Attorney General power to suspend deportation places no restrictions on the mode of exercise of that power. It does not even require a hearing. It cannot be read to preclude reference by the Attorney General to matters outside a record of hearing in exercising his discretion.

Nor has the Attorney General by his regulations denied himself this power which Congress left him. The regulations applicable to petitioner's case clearly contemplated that undisclosable records might be relevant and could be considered in determining an application prior to the deportation hearing for suspension of deportation. While the regulations accord the alien a hearing on the application for suspension when the issue of deportability is heard, they nowhere forbid the Attorney General's reference to undisclosable information in making his ultimate determination.

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To hold otherwise is to read a crippling self-imposed restriction into the regulations. Congress, well knowing the Attorney General's access to information which must sometimes remain confidential in the public interest, trusted his judgment in dispensing clemency to deportable aliens. If that judgment, based on matters the Attorney General believes should remain undisclosed, is against clemency, the Attorney General is under a duty to act upon it. Petitioner's contentions would require the Attorney General either to suspend deportation, contrary to his judgment, or disclose information he deems confidential, contrary to his duty.

III

The controverted allegation that his application for suspension was "prejudged," except to point up the fact that what he seeks is a probe of the mental processes of the Board and the Attorney General, adds nothing to petitioner's case. The allegation rests solely upon the announcement in October, 1952, of a drive against aliens, including petitioner, believed to be racketeers. It amounts ultimately to a bare reassertion that the Attorney General, though he is charged with both functions, cannot conclusively exercise his discretionary suspension power in the case of an alien against whom he has brought deportation proceedings.

IV

The allegation that deportation had been suspended in "similar cases" stated no provable fact requiring a hearing. Judgment as to whether discretionary relief should be granted turns on the individual facts of each case. It would be neither proper nor fruitful to undertake to appraise the thousands of cases in which suspension has been granted or denied to determine whether some nonexistent rule of mechanical application had been followed in this case.

ARGUMENT

It should be emphasized at the outset that, as the court below stated (R. 19), there is in this case no issue as to the validity of the administrative proceeding insofar as it relates to the determination that petitioner is subject to deportation as an alien who entered the United States illegally. The question here involved relates only to the discretionary relief of suspension of deportation, a matter of grace and not of right. Petitioner's allegations must be considered in the light of the fact that what he seeks is in effect an exercise of the pardoning power of the executive. This power, it must be remembered, has been confided by Congress to the Attorney General's discretion. We think the very nature of the discretion involved precludes the kind of search petitioner proposes beyond the record into the minds of the

Attorney General and his delegates. Moreover, the proposal is particularly ill-conceived in this case where, long before the existence of the departures from the record he alleges, petitioner acknowledged the Attorney General's power to refer to matters outside the record in exercising his discretion.

It is important, too, that the facts of this case, and their chronology, be focused clearly in defining the issues presented. It bears emphasis that the hearing officer who ruled that petitioner should be deported, and that suspension of deportation should be denied, rendered his decision in May of 1952, months before the statement of the Attorney General upon which petitioner predicates his case. Petitioner does not—he could not—question that the hearing officer's determination was an objective conclusion that petitioner's record, including a conviction for conspiring to defraud the United States within two years after his illegal entry and highly suspicious financial affairs thereafter, afforded no basis for the dispensation of discretionary relief from deportation. Similarly, the Assistant Commissioner's order of deportation and denial of discretionary relief, issued in July of 1952, again prior to the statement of the Attorney General in the following October, is immune to the theory upon which petitioner attacks the refusal to suspend his deportation.

What the case comes down to, then, is simply this (see Pet. Br. 19–20): On October 2, 1952, the Attorney General announced a drive to deport alien racketeers, and petitioner was believed by the Department of Justice to fall within this category. Because of this, petitioner says, his case was "pre-judged by the Attorney General" (R. 4)—*i. e.*, adjudged by the Attorney General not to warrant discretionary relief prior to the decision of the Board of Immigration Appeals. In appraising this argument—even apart from the fact that the Attorney General's authorized representative has sufficiently denied the mental state petitioner attributes to the Attorney General—it is vital to remember that the Board of Immigration Appeals is an agency (1) created by and "in the Office of the Attorney General," (2) under the supervision and direction of the Attorney General and "responsible solely to him" (8 C. F. R., 1949 ed., 90.2), and (3) subject to review by the Attorney General (*id.*, 90.12). No less important is the fact that the discretion petitioner invoked was not that of the Board, but that of the Attorney General, upon whose advisory judgment Congress saw fit to rely.

Finally, it should be observed here at this early point in our argument that the claim of petitioner would, if accepted, mean that the Attorney General's possession of a discretionary pardoning power somehow precludes his personal participa-

tion in the enforcement duties with which Congress has charged him under the immigration laws. For, as petitioner's description of his "information and belief" makes clear (Br. 19–22), the charge of prejudgment means only that the Attorney General had determined to proceed against petitioner as an undesirable alien who was here (admittedly) illegally. We believe, in short, that petitioner's case rests in the last analysis upon the fact that the Attorney General in this instance is personally identified with obedience to the statutory command that aliens in petitioner's class "shall, upon the warrant of the Attorney General, be taken into custody and deported * * *." 8 U. S. C. (1946 ed.) 155 (a). It is our position that the Attorney General's performance of his duties in this respect affords no basis for disturbing the Attorney General's denial of discretionary relief—especially where, as here, the record on its face amply sustains the judgment that petitioner's career in the United States did not justify the executive clemency he sought.

I

SUSPENSION OF DEPORTATION IS A MATTER OF GRACE

Prior to 1940, the immigration laws contained no provision for relief in the case of a deportable alien. Unless Congress passed a private bill on his behalf, a deportable alien, however deserving in the particular case, was required under the

statutes to be expelled.[3] See Van Vleck, *The Administrative Control of Aliens,* p. 134.

Because cases arose in which the individual alien was "technically subject to expulsion, but * * * except for the technicality a desirable resident," it became apparent that there was a "need for executive clemency." *Ibid.* Legislation to supply this need was proposed by the Immigration and Naturalization Service in the Seventy-third and Seventy-fourth Congresses, but was not enacted until 1940, when the Seventy-sixth Congress in the Alien Registration Act (54 Stat. 670, 672) provided for suspension of deportation. As amended in 1948 in respects which are immaterial here, this statute provided in pertinent part, 8 U. S. C., Supp. V, 155 (c):

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or

[3] Mitigating somewhat the hardships entailed by this situation, administrative regulations established in 1935 a system of "preexamination" under which aliens eligible for an immigration visa could have their status adjusted by leaving the country for Canada or other contiguous territory, obtaining a visa, and then reentering. For a description of the operation of this procedure, see S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 603–606.

> minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948.

The statute went on to provide that if the deportation of an alien was suspended for more than six months, the pertinent facts and law were to be reported in detail to Congress. Deportation could be canceled only if Congress passed a concurrent resolution stating in substance that it favored the suspension of deportation.[4]

It is clear from the statutory language alone that suspension of deportation is a matter of grace and not of right. Congress provided that, where the stated requirements were met by the alien, "the Attorney General may"—not "shall"—suspend deportation. See *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372–373 (C. A. 2). As the Senate Judiciary Committee observed in its study of the immigration laws preparatory to their recent revision (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600):

> Suspension of deportation is a discretionary action. Technical compliance by the alien with the formal eligibility requirements does not necessitate a conclusion that he will be granted suspension of deportation.

[4] The 1940 Act had provided for cancellation of deportation only if Congress took no adverse action within a stated period. 54 Stat. 672, 8 U. S. C., 1946 ed., 155 (c).

It was intended, in a word, that the Attorney General, subject to ratification by Congress only when he took action favorable to the alien, would decide on the particular facts of each case whether the alien was the kind of person who should be granted the relief allowed by the statute.

This conclusion is confirmed by the legislative history of the statute. As the bill which became the Alien Registration Act passed the House and was considered by the Senate, it provided for hearings on suspension by the Board of Review in the Department of Labor (then charged with enforcement of the immigration laws). See Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 76th Cong., 3d Sess., on H. R. 5138, pp. 3–4. The bill provided that the Board in such cases should "act independently as a quasi judicial body" and that its decisions and recommendations should "not be subject to the control of any other officer of the Government." As in the version ultimately enacted, Congress retained control over this dispensing power, requiring reports of suspensions for more than six months containing "appropriate recommendations and the reasons for clemency * * *."

Mr. Shaughnessy, Deputy Commissioner of Immigration, while not opposed to the proposal to allow "clemency"—which had, after all, been sponsored by his agency (*supra*, p. 19)—voiced

objection to the bill's provision for "quasi judicial" action by the Board of Review. Explaining that this Board existed merely as an informal body of advisers to the Secretary of Labor, he said (Hearings, *supra,* p. 28):

> Therefore, there is no statutory board to which the amendment could refer and it has an effect of attempting to restrict the head of the department by limiting his authority to act upon the recommendation or decision of a subordinate administrative agency within his department. Moreover, the amendment includes the idea of a departure from a long-established principle that immigration administration should be a purely executive function, since this bill attempts to some extent to make that function a quasi judicial one.

As the bill was reported by the Senate Committee and passed by the Senate, the provision for quasi-judicial action was eliminated and decision as to suspension was merely left to the Attorney General (to whom immigration functions had in the meantime been transferred.)[5] S. Rep. No. 1796, 76th Cong., 3d Sess., p. 2. The Senate version was adopted. See H. Rep. No. 2683, 76th Cong., 3d Sess., pp. 9–10.

That the language of the statute was interpreted by the Attorney General as giving him discretion to determine each application for relief

[5] Reorganization Plan No. V, effective June 14, 1940, 5 Fed. Reg. 2223, 54 Stat. 1238.

on its individual merits was made crystal clear in the hearings on the 1948 amendments. Hearings before the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 245. Mr. Shaughnessy, testifying with respect to the proposed amendments to create new classes eligible for discretionary relief, said (*id.*, p. 35):

> None of the provisions of this bill is mandatory upon the Attorney General. He has the discretion in every single case.

And again at p. 40:

> In vesting any discretionary power in these administrative folks, we realize that we are passing a law for all time, or at least for a long time in the future, and that there will be various personalities occupy that high position of Attorney General; but that is a gamble you have to make. There is nothing unusual about that.

See also the testimony of Attorney General Clark (*id.*, p. 128 *et seq.*) referring repeatedly to his exercise of "discretion" in the type of case under consideration.[6]

Following the plain mandate of the statutory language and history, the courts have consistently

[6] Like every other authority which has considered the subject, the President's Commission on Immigration and Naturalization in its Report in 1953 described the Attorney General's power as a "discretionary power to suspend deportation * * *." *Whom We Shall Welcome*, p. 211.

recognized that suspension of deportation was intended to be a matter of executive grace, subject at most to very limited judicial review for failure to exercise discretion or for misconception of the applicable law. As stated by Judge Learned Hand in *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (C. A. 2), the "power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." Similarly, in *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2), it was held: "The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion." And in *Sleddens* v. *Shaughnessy,* 177 F. 2d 363, 364 (C. A. 2), the court held that the "relator's claim in the habeas corpus proceedings that he was entitled to suspension of deportation was properly held to be without merit because such suspension was a matter of discretion on the part of the Attorney General which the court was without power to review." See also *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876;

United States ex rel. Walther v. *District Director of Immigration and Naturalization,* 175 F. 2d 693, 694 (C. A. 2); *United States ex rel. Zeller* v. *Watkins,* 167 F. 2d 279, 282 (C. A. 2); *United States ex rel. Bartsch* v. *Watkins,* 175 F. 2d 245, 247 (C. A. 2); *Arakas* v. *Zimmerman,* 200 F. 2d 322 (C. A. 3).

II

THE ALLEGED USE OF CONFIDENTIAL INFORMATION PRESENTS NO ISSUE REQUIRING A HEARING

In his Exceptions, Argument and Brief following the order of the hearing officer, petitioner said (I. R. 163):

> That it is acknowledged that relief from deportation is not a right of any applicant but is a matter of discretion within the province of the Attorney General and to be exercised by him, and that he may consider evidence and information which may not be of record in order to properly arrive at a decision upon an action for discretionary relief.

For reasons developed below, we think petitioner was clearly correct in this view, and that he was in error when, in his second application for habeas corpus, he advanced the opposite thesis he now espouses. We submit, moreover, that the new position comes too late. At a time when there was no reason to suppose that confidential information would lead to denial of his request for discretionary relief, petitioner in effect sanc-

tioned and invited the use of such information as a basis for decision. Cf. *Bridges* v. *Wixon*, 326 U. S. 135, 151–153. He ought not to be heard to complain now that this course was followed.

But the complaint is in any event without merit. In the first place, as the courts below held, the record in this case, amply justifying the refusal to suspend deportation, made it unnecessary to place the Attorney General or his delegates on trial to determine whether (despite what appeared in the record and despite the sworn denial) confidential information had been considered in denying petitioner's application for discretionary relief. Secondly, there would be in any event no barrier to the Attorney General's reliance upon confidential information in exercising his discretion to determine whether clemency should be granted and whether he should make a recommendation of such action to Congress. For the statute imposes no such limitation. And petitioner, relying on regulations which were not applicable to this case, is mistaken in his contention that the Attorney General has, by his regulations, imposed upon himself a prohibition against using confidential information.

A. IN THE CIRCUMSTANCES OF THIS CASE, THE CONTROVERTED ALLEGATION THAT CONFIDENTIAL INFORMATION HAD BEEN RELIED UPON BY THE ATTORNEY GENERAL POSED NO ISSUE OF FACT REQUIRING A HEARING

As the court below observed (R. 21–22), the Attorney General's announcement in October

1952, of a drive against undesirable aliens was made months after the hearing officer and Assistant Commissioner ruled against petitioner's application for discretionary relief, "and could not have influenced them." While the announcement preceded the affirmance by the Board of Immigration Appeals, the "Board's opinion discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation." (R. 22.) Contrary to petitioner's suggestion (Br. 22) "that he is one of the innocents caught in the current deportation drive" (though he denies neither the illegal entry which makes him deportable, the crime of fraud against the United States, nor his dubious financial affairs, including claiming as a dependent for tax purposes a father with substantial means), all three of the administrative decisions announce powerful justification for withholding the executive clemency petitioner seeks. On this record at least, assuming that the kind of inquiry petitioner proposes could ever be justified, there was no occasion to probe further into the mental processes of the officials who had decided against petitioner's application for relief from deportation.

1. There is, of course, no doubt that the courts below were correct in considering the whole record before them to determine whether a hearing was required. The procedure of ascertaining the facts of record before determining whether a petition

for habeas corpus should issue was sanctioned in *Walker* v. *Johnston,* 312 U. S. 275, 284, where this Court said:

> It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

The procedure established by *Walker* v. *Johnston* is today codified in 28 U. S. C. 2243, which authorizes issuance of an order "to show cause why the writ should not be granted" and provides that the person detained need not be produced at the hearing if "the application for the writ *and the return* present only issues of law." [Emphasis added.] See also *Burns* v. *Wilson*, 346 U. S. 137. In this case the affidavit of the Assistant United States Attorney (R. 5–8), with the record attached, served the function of a return "certifying the true cause of the detention" under 28 U. S. C. 2243.

The record showed that, long before issuance of the statement upon which the petition is based, a hearing officer had concluded that petitioner was not a worthy subject for suspension of deportation. It showed a similar determination by the Assistant Commissioner, again based on the facts of record and again prior to the Attorney General's October 1952 press release. It showed, finally, that the concurring decision of the Board of Immigration Appeals, which is ultimately the supposed basis for petitioner's attack, made no reference to facts outside the record.

The Board concluded in its opinion (I. R. 12, Pet. Br. 34): "After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion." The "facts and circumstances in the case," all in the record, in-

cluded (1) the conviction of petitioner in 1941 for conspiring, beginning two years after his illegal entry, to defraud the United States; (2) the discrepancy between petitioner's claiming his father as a dependent for income tax purposes and the father's conveying assets worth $50,000 as gifts to his daughter-in-law; and (3) the general obscurity as to the source of petitioner's assets, and the difficulties in reconciling his testimony as to his earnings with the evidence of substantial property.[7] These facts spoke persuasively against favorable exercise of the dispensing power Congress had entrusted to the Attorney General's discretion. At the least, they constituted wholly sufficient reason for denial of the discretionary relief petitioner sought. See *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2).

2. In the face of the record, what did petitioner allege? That the Attorney General had prepared a list of "unsavory characters" against whom deportation proceedings were to be brought; that petitioner was on this list; and that matters outside the record had been considered in denying the relief the Attorney General has discretion to

[7] The hearing officer, in his 1951 decision recommending against suspension of deportation, observed, after considering petitioner's financial situation: "A careful consideration of the evidence adduced during the hearing is not sufficiently convincing to satisfactorily indicate source of income of the [petitioner], nor the total amount of such income" (I. R. 160).

grant (R. 3–4). The "information and belief" petitioner alleged is elaborated in his brief (pp. 19–22), which makes clear that petitioner's case rests entirely upon the fact that officials of the Department of Justice have (1) performed their duty to bring deportation proceedings against aliens residing here illegally, (2) expedited cases of aliens deemed to be particularly undesirable, (3) believed petitioner to belong to this class, and (4) made public statements describing these activities following the decision of the Board of Immigration Appeals in this case on April 3, 1953. These allegations afforded no warrant for the additional, judicial hearing petitioner sought on his claim for clemency. It was sufficient on this record that the facts sustained denial of the claim by the executive authority Congress trusted to pass upon it; that there was no need to go beyond these facts to reach this conclusion; and that the Attorney General's authorized representative had entered a sworn denial that matters outside the record had been considered. Any other view would, as the court below concluded (R. 23), provide a ready means for "every deportable alien * * * to delay his justifiable deportation" by demanding a judicial inquiry into the process of judgment resulting in the denial of discretionary relief.

For the fact is present in every case that the Attorney General is "the executive head of the Immigration and Naturalization Service" (*Carl-*

son v. *Landon,* 342 U. S. 524, 526), and that "the power to deport has been entrusted [to him] * * * or such agency as he designates" (*Bridges* v. *Wixon,* 326 U. S. 135, 153). It is, by statute, "upon the warrant of the Attorney General" that a deportable alien is "taken into cutsody and deported." 8 U. S. C. 155 (a). In administering this and his many other responsibilities, the Attorney General or his delegate must, as everyone knows, make investigations, gather information (often confidential), and make judgments as to the relative gravity and priority of various tasks.

There is nothing extraordinary, therefore, in the fact that efforts should be made by the Department of Justice to expedite proceedings against deportable aliens whose presence here is deemed particularly undesirable. Nor is it surprising that public statements (of which all those mentioning petitioner came after the decision of the Board of Immigration Appeals on April 3, 1953) should be made describing these efforts. Yet petitioner contends that such facts entitle him to a trial of his "information and belief" that the administrative judgments which led to deportation proceedings against him precluded the exercise of discretion in considering his application for discretionary relief.

It is clear, we think, that it is this premise upon which petitioner's case stands or falls. He has described his "information and belief" at some

length (Pet. Br. 19–22). He justifies this form of his pleading by pointing out (Br. 26) that the facts he alleges are peculiarly within the knowledge of the Attorney General. He asserted baldly in his petition for habeas corpus that consideration had been given to "matters outside the record of his immigration hearing" (R. 4), but gave no intimation of the nature or form of these matters beyond the subsequent public statements to which he refers here. Petitioner asks, in short, that the administrative decision, adequate and regular on its face, be tested by eliciting facts peculiarly within the knowledge of the Attorney General to establish that the exercise of administrative discretion was as proper as it appears to be.

To embark upon such an inquiry upon the allegations petitioner presents is to deny that the Attorney General can properly be trusted both to prosecute deportation proceedings and to grant executive relief from deportation. But judgment on this question, whatever its merits, was for Congress.

We have accepted for this portion of our argument the assumption (later, subpoint B, *infra,* urged to be incorrect) that matters outside the record of the deportation hearings could not be considered in determining whether to grant suspension of deportation. We submit, however, that petitioner's conjectures, which were denied, that the prosecuting activities of the Department of Justice pervaded and destroyed the exercise of the

Attorney General's power to grant discretionary relief do not merit the trial petitioner seeks of the deciding process. This Court has had occasion before to disapprove attempts to probe the minds of administrators. *United States* v. *Morgan*, 313 U. S. 409, 421–422; Davis, *Administrative Law*, p. 336. No such probe was warranted here.

3. We do not contend, nor do we understand the court below to have held, that allegations in a petition for habeas corpus are insufficient to raise an issue of fact requiring a hearing merely because they are made on information and belief. Reading the opinion as a whole, we think the majority holds that in this case—where the evidence of record so amply supports the conclusion reached, where decisions adverse to petitioner had been made by both the hearing officer and the Assistant Commissioner before compilation of the alleged list on which petitioner relies—it takes more than such general allegations as petitioner has made on information and belief to raise an issue requiring a hearing. It is not new law that facts are required to support a petition for habeas corpus. *Cuddy, Petitioner*, 131 U. S. 280, 286; *Kohl* v. *Lehlback*, 160 U. S. 293, 299; *United States* v. *Ju Toy*, 198 U. S. 253, 261; *Collins* v. *McDonald*, 258 U. S. 416, 420; *Hodge* v. *Huff*, 140 F. 2d 686, 688 (C. A. D. C.), certiorari denied, 322 U. S. 733; *Long* v. *Benson*, 140 F. 2d 195, 196 (C. A. 6), certiorari denied, 322 U. S. 732. And it was apparent from petitioner's argument below,

as here, that his allegation of reliance by the Board of Immigration Appeals upon matters outside the record was built on speculation. From the fact that a group of deportation proceedings was deemed important to prosecute because the deportable aliens involved were believed undesirable, it did not follow at all that the Board of Immigration Appeals abandoned the judgment the Attorney General had instructed it to exercise on his behalf in determining whether his discretionary grant of relief would be warranted.

This is most readily illustrated by the careful, and sometimes favorable, action which has been taken by the Attorney General's subordinates in cases which, like petitioner's, were expedited under the Attorney General's program to insure enforcement of the deportation laws against aliens believed to be especially undesirable. In two of these cases, special inquiry officers (hearing officers) have ruled that the persons involved were not subject to deportation.[8] In two others, the Board of Immigration Appeals has affirmed orders granting the privilege of voluntary departure which, like suspension of deportation, is within the Attorney General's discretion.[9] In

[8] *Matter of M——*, Imm. File No. E–076973 (January 7, 1954); *Matter of R——*, Imm. File No. A–4656075 (January 14, 1954). The decisions in both cases will be reviewed by the Board of Immigration Appeals.

[9] *Matter of M——*, Imm. File No. A–2182808 (January 25, 1954); *Matter of F——*, Imm. File No. A–7388927 (August 19, 1953).

other cases, following orders for deportation, the Board has ordered the proceedings reopened to consider further applications for suspension of deportation or to permit the filing of such applications.[10] These instances merely illustrate that decisions in the Department of Justice to commence deportation proceedings are neither decisions in advance on deportability nor judgments in advance on the propriety of discretionary relief. It was clear in the courts below, as it is here, that petitioner's allegations amounted only to the contrary conjecture that his case had been prejudged because it was deemed to warrant expedition.[10a]

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[10] *Matter of B——*, Imm. File No. E–082511 (October 10, 1953); *Matter of B——*, Imm. File No. A–2544646 (December 28, 1953); *Matter of C——*, Imm. File No. E–051721 (January 21, 1954); *Matter of M——*, Imm. File No. A–3486560 (October 9, 1953).

[10a] One of the very press releases upon which petitioner relies—a release, incidentally, which followed by months the conclusion of petitioner's case—illustrates the tenuous character of petitioner's theory that because it is responsible for prosecuting cases like this (and because some may be deemed to warrant priority) the Department of Justice must *ipso facto* account in court for a denial of discretionary relief. The brief statement of Deputy Attorney General Rogers on September 29, 1953, to the District Directors of the Immigration and Naturalization Service (referred to at Pet. Br. 21), reviewing the efforts to deport undesirable aliens who are in this country illegally, concluded with these observations:

> We are all aware of the tremendous amount of manpower and time required to process denaturalization and deportation cases to a conclusion. Aside from investigation, review, and administrative adjudications and appeals, there are judicial reviews, stays, and appeals

Nor was petitioner's inference rendered any less speculative by the fact that, after the decision of the Board of Immigration Appeals on April 3, 1953, statements emanating from the Department of Justice described him as a racketeer and an undesirable alien. It remains clear that all petitioner was alleging was that the Board *must have* acted on the basis of such outside matters and not, as it purported to act, on the basis of the facts of record [11]—and this after a new At-

which must be met and served before final action may be taken in any case. We are not begrudging these time and manpower consuming steps—on the contrary we would be the first to defend the naturalized citizens' and aliens' right to them—but we should make certain that we handle them with as much dispatch and vigor as is consistent with good government and the rights of the parties involved. There should be no delay occasioned or tolerated through negligence, indifference, or purely dilatory tactics. The alien or naturalized citizen, as well as the public as represented through its Government, is entitled to a speedy but thorough adjudication of these cases. Moreover, whenever the opportunity arises, care should be taken to explain to members of the public these various steps which must be taken in the denaturalization and deportation processes so that they may understand why such action cannot and should not be accomplished in a summary manner, a manner in which we know that the American people would not countenance even if it were legally possible.

[11] It should be noted that when the Board of Immigration Appeals has considered confidential information it has said so. See, *e. g.*, *United States ex rel. Matranga* v. *Mackey*, 115 F. Supp. 45 (S. D. N. Y.); *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.). If such information had been considered by the Board in this case, it may fairly be assumed that the Board would have referred to this fact, just as it referred to the other specific facts which sustain its decision.

torney General had taken office. It is equally clear that the refutation of this controverted supposition called ultimately for testimony in court by the Board and the Attorney General to show that their actions were what they appeared to be. In this context, particularly in light of the fact that the determination in issue was the denial of clemency which is within the Attorney General's discretion, we think it clear that the courts below correctly denied the further hearing petitioner sought.

B. NEITHER THE STATUTE NOR THE REGULATIONS OF THE ATTORNEY GENERAL PRECLUDE REFERENCE TO CONFIDENTIAL INFORMATION IN EXERCISING THE DISCRETIONARY POWER TO SUSPEND DEPORTATION

1. As we have shown in Point I (pp. 18–25, *supra*), suspension of deportation is not a matter of right, but of grace, in the nature of an executive pardon. The statute leaves the dispensation of this privilege entirely to executive discretion, subject to control only by the legislature—a control designed only to deny the privilege to some aliens deemed worthy by the Attorney General, not to revise his judgment where it is against suspension. The statute does not even require that there be a hearing on an application for suspension of deportation. It leaves to the unfettered determination of the Attorney General the procedure he is to employ in exercising his power.

It is clear, therefore, at least so far as the statute is concerned, that the Attorney General

is free, as the President is free in exercising the pardoning power, to consider any information he deems relevant, from whatever source, in deciding whether an alien who meets the minimum requirements fixed by Congress is entitled to administrative grace. *Cf. Knauff* v. *Shaughnessy,* 338 U. S. 537, 542, 544.[12] Even where statutes in terms require a "hearing" as part of the administrative process, the statutory purpose and context may justify withholding confidential information from the party entitled to be heard. *United States* v. *Nugent,* 346 U. S. 1; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294. Here, where there is no such requirement, the justification is obvious. Congress chose to rely upon the informed judgment of a Cabinet officer whose facilities for investigation are well known. It trusted him with a power of dispensation akin to powers of executive and judicial clemency which are commonly exercised by reference to matters outside a record of hearing.[13] There is, in a word, no basis for petitioner's effort (Br. 17–

[12] There is, of course, no doubt—and petitioner suggests none—that Congress could constitutionally authorize the Attorney General to proceed on confidential information in cases like this. Compare *Williams* v. *New York*, 337 U. S. 241, 247, holding that a sentencing judge, ordering execution rather than the life sentence recommended by a jury, could rely in reaching this judgment upon information not disclosed to the convicted defendant.

[13] Overlooking the character of the discretionary relief sought, petitioner is wide of the mark when he invokes (Br. 26–27) procedural analogies from fields of regulatory administrative action subject to full judicial review.

18) to find in the silence of Congress a prohibition against use of confidential information in deciding whether to suspend deportation. Cf. *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C. A. 2).

2. For his objection to the use of confidential information, petitioner rests primarily (Br. 12–17), as did Judge Frank, dissenting, in the court below (R. 24), upon the regulations issued by the Attorney General. Relying upon the fact that, although Congress did not require it, the Attorney General has granted a hearing to a deportable alien seeking suspension of deportation, petitioner finds in the regulations governing this hearing a prohibition against reliance upon confidential information by the Attorney General—or by the agency he has created within his Office to act for him, subject to his supervision and review, the Board of Immigration Appeals. We submit that the regulations applicable to this case contain no such self-imposed restriction.

It should be noted, first, in this connection, that petitioner relies on regulations which were inapplicable to his case, referring repeatedly (Br. 6–7, 15, 26) to 8 C. F. R. (1949 ed.) 150.7 (b), which was superseded before the hearing involved here. This regulation and the others then in existence were interpreted in *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.) as creating "a quasi-judicial procedure" whereby the Attorney General denied himself the use of information

undisclosed to the alien. As we indicate below (notes 15 and 17, *infra*), and as petitioner's misplaced reliance upon them suggests, the regulations applicable in the district court decision in *Alexiou* may have afforded a somewhat more substantial basis for petitioner's contention than do the regulations applicable here. But we do not stop to reargue *Alexiou* in the light of the regulations it considered, except to note our belief that the decision was erroneous. For the regulations were changed in 1950 and January, 1951, before petitioner's new hearing was begun in August, 1951. Concentrating on the later regulations applicable to petitioner's case, we submit that they cannot justify the claim that the Attorney General has divested himself of the power Congress left him to refer to confidential matters in exercising his discretion. Compare *United States ex rel. Matranga* v. *Mackey,* 115 F. Supp. 45 (S. D. N. Y.),[14] discussing the *Alexiou* case and the changes in the regulations, and concluding that the changed regulations did not bar reliance by the Board of Immigration Appeals upon confidential information.

Among the changed regulations in force at the time of petitioner's hearing in 1951 were those issued on January 4, 1951, allowing an alien against whom deportation proceedings had

[14] Pending on appeal in the Court of Appeals for the Second Circuit.

been commenced to apply before hearing for suspension of deportation. 8 C. F. R. (1951 Supp.) 150.7–150.13. These regulations stated (Section 150.9):

> * * * The burden of proof shall be upon the applicant. In presenting his proof he shall be entitled to the benefit of *any disclosable records* concerning him which are in the custody of the Service. [Emphasis added.]

It was further provided (Section 150.10):

> * * * If the sworn application form, supporting documentary evidence, *records of the Service,* and the testimony of the applicant * * * establish the applicant's eligibility for suspension of deportation, no other witnesses shall be required. [Emphasis added.]

Thus, the regulations indicated at their outset that records of the Service might be considered in judging an application for suspension. Granting the alien access to records which were *disclosable,* they show that as to others which might be undisclosable there would be no such access.[15] There is nothing in the rest of the regulations to sustain the view that records which were undisclosable but relevant on the pre-hearing application were somehow required to be disclosed or excluded from consideration when the Attorney

[15] The regulations prior to those applicable here did not contain references to use of records of the Service and use by the alien of disclosable records like those we have quoted.

General or the Board made the ultimate determination as to whether discretionary relief should be granted.

The regulations did provide that if his prehearing application for suspension was denied, the alien could make another application "during the course of the hearing under the warrant of arrest." 8 C. F. R. (1951 Supp.) 150.12. The regulations governing the hearings stated, as petitioner points out (Br. 15), that the hearing officer should "present all *available* evidence * * * concerning * * * factors bearing upon *statutory eligibility* for discretionary relief * * *." *Id.*, 151.2 (c) (emphasis added).[16] It was also provided that the hearing officer's decision should "contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's *statu-*

[16] It may be noted that "statutory eligibility" is a necessary, but not a sufficient, condition for the granting of discretionary relief by the Attorney General. And the regulations under consideration highlighted this point. Thus, Section 150.13, pertaining to the application for suspension before the deportation hearing, provided:

> If, on the basis of the evidence presented, the Commissioner is satisfied that the alien has established eligibility for suspension of deportation, and if the Commissioner is satisfied that suspension of deportation should be authorized, he shall enter an order directing that the alien's deportation be suspended.

The Commissioner was required to be satisfied by the "evidence" as to "eligibility," but there was no suggestion that he was forbidden to go beyond the record in determining whether suspension "should be authorized."

tory eligibility for the relief requested." *Id.*, 151.5 (a) (emphasis added). But the same regulation declared that the hearing officer should have "no authority to exercise the Attorney General's powers" to grant discretionary relief.[17] This determination was to be made in the first instance by the Commissioner under Section 151.5 (e), subject to a right of appeal to the Board of Immigration Appeals. The Commissioner was empowered under 151.5 (e) to "enter any order which he deems appropriate for the disposition of the case."

The most obviously pertinent facts about the foregoing regulations are (1) that they show expressly, at least with reference to an application

[17] Compare the superseded regulations to which petitioner refers. Under these the presiding inspector (hearing officer) was required, where the alien applied for suspension of deportation, to "follow his conclusions of law as to the alien's deportability with a discussion of the evidence relating to the alien's eligibility for such relief and of his reasons for his proposed order." 8 C. F. R. (1949 ed.) 150.7 (b). Then, in his proposed order, the inspector was authorized to recommend "suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing." *Id.*, 150.7 (c).

We do not concede that this provision for a proposed order based on "the evidence adduced at the hearing," should have been read, as it was by the district court in *Alexiou* v. *McGrath*, *supra*, as constituting a prohibition by the Attorney General against reference to confidential information by himself or by the Board he had created to act for him subject to his supervision and review. But we point out here that the subsequent regulations afford even less basis for implying any such prohibition.

for suspension prior to the deportation hearing, that undisclosable matters may be pertinent in passing upon such an application, and (2) that they contain no express prohibition against consideration of such matters at any time by the Attorney General or the Board of Immigration Appeals. The prohibiton, if the Attorney General intended to issue it against himself, must be found by implication. And the implication must be that, because he afforded the alien a hearing Congress does not appear to have required, the hearing must entail all the restrictions drawn from contexts where judgment is less free and judicial review broader.

We think there is no warrant for reading into the Attorney General's regulations any such restrictions on his discretionary power to grant what amounts to executive clemency. It made perfect sense, of course, to hear the alien's evidence bearing on his application for relief along with evidence as to deportability. It was appropriate and necessary that all available evidence relating to possible suspension should be received and considered, and it was reasonable to require the hearing officer to summarize the evidence for the Attorney General or his delegates with power of decision. But it does not follow that because his regulations served these purposes, the Attorney General forbade himself the use of material he deemed undisclosable. Cf. *Ludecke* v. *Wat-*

kins, 335 U. S. 160, 171–172.[18] Congress relied upon the judgment of the Attorney General. Cases may arise where that judgment is against clemency and where matters underlying the judgment are deemed undisclosable. Neither the statute nor the regulations can justify a requirement that the Attorney General either recommend suspension to Congress, contrary to his views, or disclose to the alien matters which he believes should be kept confidential in the public interest.

Such cases are unlikely to be common. For reasons we have outlined, we think it clear that no such case is here now. Be this as it may, the regulations petitioner invokes afford no basis for further delay of "his justifiable deportation" (R. 23). In proceedings which complied fully with the regulations, his application for suspension of deportation was properly denied.[19]

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[18] "The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts."

[19] The regulations now in effect under the Immigration and Nationality Act of 1952 expressly sanction the administrative practice the Attorney General deemed proper under his prior regulations. It is now provided that "the determination as to whether the application for * * * suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security." 8 C. F. R. (1952 ed.) 244.3.

III

PETITIONER'S ALLEGATION THAT HIS CASE WAS PREJUDGED DID NOT POSE AN ISSUE OF FACT REQUIRING A HEARING

The petition for habeas corpus alleged (R. 4, par. 19) that "the decision to deny favorable discretionary relief herein was prejudged by the Attorney General on October 2, 1952," when petitioner's name was included in the alleged list of aliens against whom deportation proceedings were to be expedited. The court below concluded (R. 22) that this allegation, which was denied (R. 6, 7), added nothing to petitioner's case. For reasons substantially similar to those already discussed in connection with the allegation that confidential information was considered, we think the courts below were clearly correct in denying petitioner's right to search the Attorney General's mind for the "prejudgment" he suspected.

Here again it is highly relevant that the hearing officer had recommended, and the Assistant Commissioner had decided on the record, that suspension of deportation should be denied before the alleged prejudgment in October 1952. There remained only an appeal to the Board of Immigration Appeals, an agency created by the Attorney General in his Office to act for him in such cases subject to his supervision and review. 8 C. F. R. (1949 ed.) 90.2, 90.12.

Even assuming for the purposes of argument that the Attorney General in effect dictated the

decision of the Board of Immigration Appeals, petitioner was deprived of no rights. Given the Attorney General's power to review and reverse his Board, petitioner's only practical complaint would be that the Attorney General's ruling appears to be the Board's rather than his own. Such an allegation would not, even if true, show the deprivation of any substantial right or warrant invalidation of the Attorney General's exercise of his discretion.

But petitioner's information and belief does not descend to a concrete allegation that the Attorney General dictated the Board's decision. And it would be a startling thing indeed—scarcely to be inferred from the broadside charge of "prejudgment"—to suggest that the Attorney General found it necessary to dictate the Board's decision to spare himself the possible task of reversing a determination with which he disagreed. The complaint merely is, however, that the Attorney General "pre-judged * * * when he included [petitioner's] name in the list" (R. 4)—*i. e.*, that the very act of selecting this case for prosecution vitiated the later decision on petitioner's application for discretionary relief.

The short answer again is that both functions—the prosecution of deportation cases and decision on applications for discretionary relief—have been entrusted to the Attorney General. The fact that he performed the first is no ground for launching an inquiry into his performance of the second.

IV

THE ALLEGATION THAT DISCRETIONARY RELIEF HAD BEEN GRANTED IN ALL SIMILAR CASES PRESENTED NO ISSUE WARRANTING A HEARING

Petitioner's remaining contention (Br. 26–29) is that the district court should have received evidence on the allegation that aliens in "similar cases" had received discretionary relief. The argument, unmentioned in Judge Frank's dissent, is plainly insubstantial. It rests in part on the assertion (Pet. Br. 26) "that the hearing officer, the Assistant Commissioner, and the Board of Immigration Appeals merely concluded, without disclosing the basis therefor, that discretion should not be exercised favorably." This assertion, as we have shown (see pp. 4–8, 29–30, *supra*) is thoroughly refuted by the record, which reveals in the administrative decisions grounds more than ample for deeming petitioner unworthy of discretionary relief.

More fundamentally, petitioner's argument overlooks the central point that the discretionary judgment in each case turns on the particular facts of the case. This is most readily demonstrated by reference to a decision upon which petitioner relies—*Matter of L——*, 3 I. & N. Dec. 767—in his effort to suggest that mechanically applied rules govern the granting of suspension of deportation. In that case, while it listed (p. 770) "as appropriate elements in ar-

riving at a decision" the factors to which petitioner refers (reformation, family ties, etc.), the Board of Immigration Appeals said (*ibid.*):

> We realize, of course, the difficulty, if not impossibility, of defining any standard in discretionary matters of this character which may be applied in a stereotyped manner. Even if it could be done, we feel very definitely it would be wrong to do so. Each case must be considered on its own facts. This is basic.

On this obviously appropriate test the unverifiable character of petitioner's allegation becomes apparent. Judgment in this case, as in all such cases, rested upon a total impression of petitioner's character and career as a basis for possible relief from his conceded deportability. The factors constituting the impression included, not only petitioner's conviction for conspiracy to defraud the United States (in itself no small discouragement to extraordinary hospitality), but the strange discrepancy between petitioner's claim for tax purposes that he supported his father and the evidence of the father's substantial wealth, together with petitioner's persistent inability to account satisfactorily for his own considerable assets. Manifestly, no other case, much less all other cases of aliens once convicted of crime, could present the same factors in the same detail.

Petitioner's allegation called, then, for case-by-case analysis of the thousands of instances where discretionary relief had been granted or

denied. And the demonstration petitioner proposed was plainly impossible. For the unique character of each case would render futile the effort to mark out a rule by means of the catalogue of factors petitioner suggests.

The decisive difference between this case and *United States ex rel. Knauff* v. *McGrath*, 181 F. 2d 839 (C. A. 2), vacated as moot, 340 U. S. 940, upon which petitioner relies (Br. 28), is readily stated. There, the allegation was that the Attorney General had adopted a uniform practice of staying deportation while a bill for relief was pending in Congress. The specific, concrete character of the evidence which could prove or disprove this allegation is clear. No comparable situation existed here. The futile judicial hearing petitioner sought was properly denied.

CONCLUSION

The deportation proceedings against petitioner have been pending since 1947. Petitioner is concededly in the United States illegally with no defense to the charge upon which his deportation has been ordered. The discretionary determination denying petitioner's application for suspension of deportation is fully justified by the facts in the administrative record. The allegations on which petitioner would postpone his deportation for a judicial review of the manner in which the Attorney General's discretion was exercised are

neither factually substantial nor legally significant. It is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1954.

APPENDIX

Section 19 (c) of the Immigration Act of 1917, as amended, 8 U. S. C. (Supp. V) 155 (c), provided in pertinent part:

> In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. [July 1, 1948]. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month

in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * * Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U. S. C., title 8, sec. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided,* That no quota shall be reduced by more than 50 per centum in any fiscal year.

8 C. F. R. (1949 ed.) 150.7 provided:

§ 150.7 *Proposed findings, conclusions, and order.* * * *

(b) *Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privi-

lege of departure in lieu of deportation or for suspension of deportation as provided in 150.6 (g), § 150.8 (b), or § 150.10, the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the evidence relating to the alien's eligibility for such relief and of his reasons for his proposed order. He shall then state in numbered paragraphs his proposed findings of fact and his proposed conclusions of law as to the alien's eligibility for the relief requested.

(c) *Proposed order.* In the proposed order the presiding inspector shall recommend cancellation of the proceedings, deportation, departure under order of deportation, departure in lieu of deportation, or suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing.

8 C. F. R. (1951 Supp.) 150 provided in pertinent part:

§ 150.7 *Application, prior to hearing, for suspension of deportation*—(a) *Who may apply.* Any alien against whom warrant proceedings have been instituted who believes himself entitled to suspension of deportation may apply therefor prior to hearing by filing Form I–256, in duplicate, properly filled out and executed, together with two photographs as prescribed in § 364.1 of this chapter, at the office of the Service having jurisdiction over the applicant's place of residence.

* * * * *

§ 150.9 *Evidence; burden of proof.* All evidence adduced during this special procedure may be used in any other proceeding and the alien shall be duly informed

of this fact. The burden of proof shall be upon the applicant. In presenting his proof he shall be entitled to the benefit of any disclosable records concerning him which are in the custody of the Service.

§ 150.10 *Examination.* * * * If the sworn application form, supporting documentary evidence, records of the Service, and the testimony of the applicant or the parent or guardian, if applicant is a child under the age of 18 years, establish the applicant's eligibility for suspension of deportation, no other witnesses shall be required. Otherwise, such number of credible witnesses, preferably citizens of the United States, as may be deemed necessary, shall be questioned under oath by the examiner concerning the facts of the applicant's eligibility for the relief requested, or, where such witnesses cannot appear because of remoteness, disability, or any other cause which the officer in charge deems good and sufficient, their affidavits may be accepted without requiring their personal appearance. * * *

§ 150.11 *Disposition by examiner*—(a) *Eligibility for relief established.* If, on the basis of the evidence presented, the examiner concludes that the alien has established eligibility for suspension of deportation, he shall prepare a memorandum stating therein the grounds for the alien's deportability and basis of the alien's eligibility for suspension of deportation. The entire record shall then be delivered to the officer in charge of the district for transmittal to the Commissioner.

* * * * *

§ 150.13 *Decision by Commissioner.* * * *

(b) *Eligibility not established.* If, on the basis of the evidence presented, the Commissioner is satisfied that the alien

has not established his eligibility for suspension of deportation, or if the Commissioner is satisfied that suspension of deportation should not be authorized, he shall terminate the special procedure and further action shall thereupon be taken as provided in § 150.12.

8 C. F. R. (1951 Supp.) 151 provided in pertinent part:

§ 151.3 *Contents of record; evidence.* * * *

* * * * *

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation with the additional privilege of preexamination. He may apply in the alternative for more than one of these three forms of relief. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. In addition, he may submit any written or oral material which he believes should be considered in the exercise of discretion by the Commissioner.

* * * * *

§ 151.5 *Decision.*—(a) *Preparation by hearing officer of written decision.* Except as provided in paragraph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclu-

sions of law as to deportability. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, as to the alien's statutory eligibility for the relief requested. * * * The hearing officer shall have no authority to exercise the Attorney General's powers under section 19 (c) (2) of the Immigration Act of February 5, 1917, as amended, or under the seventh proviso to section 3 of that act, or to designate at whose expense or to which country the alien shall be deported.

* * * * *

(e) *Finality of decision.* The hearing officer's decision described in paragraphs (a) and (d) of this section shall be final except:

* * * * *

(2) When the hearing officer determines that the alien be found to have established statutory eligibility for suspension of deportation and the hearing officer provides for no other disposition of the case;

* * * * *

(4) * * * Every case within subparagraphs (1) to (4), inclusive, shall be referred promptly to the Commissioner and the hearing officer's decision shall be final only upon approval by the Commissioner, subject, however, to appeal to the Board of Immigration Appeals as provided in § 90.3 of this chapter. In considering such cases, the Commissioner may enter any order which he deems appropriate for the disposition of the case. * * *

* * * * *

§ 151.9 *Decision by the Commissioner*—(a) *Form and finality.* The decision of the Commissioner shall be in writing and shall, unless the alien or his counsel or representative appeals to the Board of Immigration Appeals within the time specified in § 90.9 (b) of this chapter, be final.

28 U. S. C. (Supp. V) 2243 provides:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U. S. C (Supp. V) 2246 provides:

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

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SUPREME COURT OF THE UNITED STATES

No. 366.—October Term, 1953.

United States of America, ex rel. Joseph Accardi, Petitioner, *v.* Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service, New York District, Department of Justice.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 15, 1954.]

Mr. Justice Clark delivered the opinion of the Court.

This is a habeas corpus action in which the petitioner attacks the validity of the denial of his application for suspension of deportation under the provisions of § 19 (c) of the Immigration Act of 1917.[1] Admittedly deport-

[1] 54 Stat. 671, as amended, 8 U. S. C. § 155 (c) (1946 ed., Supp. V). Section 405 is the savings clause of the Immigration and Nationality Act of 1952 and its subsection (a) provides that:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any . . . proceedings . . . brought . . . at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, . . . which is pending on the date of enactment of this Act [June 27, 1952], shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. p. 734 (1952).

Since Accardi's application for suspension of deportation was made in 1948, § 19 (c) of the 1917 Act continues to govern this proceeding rather than its more stringent equivalent in the 1952 Act, § 244, 66 Stat. 214, 8 U. S. C. § 1254 (1952).

able, the petitioner alleged, among other things, that the denial of his application by the Board of Immigration Appeals was prejudged through the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of "unsavory characters" including petitioner's name, which made it impossible for him "to secure fair consideration of his case." The District Judge refused the offer of proof, denying the writ on the allegations of the petitioner without written opinion. A divided panel of the Court of Appeals for the Second Circuit affirmed. 206 F. 2d 897. We granted certiorari. 346 U. S. 884.

The Justice Department's immigration file on petitioner reveals the following relevant facts. He was born in Italy of Italian parents in 1909 and entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. This entry clearly falls under § 14 of the Immigration Act of 1924 [2] and is the uncontested ground for deportation. The deportation proceedings against him began in 1947. In 1948 he applied for suspension of deportation pursuant to § 19 (c) of the Immigration Act of 1917. This section as amended in 1948 provides, in pertinent part, that:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the pre-

[2] "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917. . . ." 43 Stat. 162, 8 U. S. C. § 214 (1946). This ground for deportation is perpetuated by § 241 (a) (1) and (2) of the Immigration and Nationality Act of 1952. 66 Stat. 204, 8 U. S. C. § 1251 (a) (1) and (2) (1952).

ceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948."

Hearings on the deportation charge and the application for suspension of deportation were held before officers of the Immigration and Naturalization Service at various times from 1948 to 1952. A hearing officer ultimately found petitioner deportable and recommended a denial of discretionary relief. On July 7, 1952, the Acting Commissioner of Immigration adopted the officer's findings and recommendation. Almost nine months later, on April 3, 1953, the Board of Immigration Appeals affirmed the decision of the hearing officer. A warrant of deportation was issued the same day and arrangements were made for actual deportation to take place on April 24, 1953.

The scene of action then shifted to the United States District Court for the Southern District of New York. One day before his scheduled deportation petitioner sued out a writ of habeas corpus. District Judge Noonan dismissed the writ on April 30 and his order, formally entered on May 5, was never appealed. Arrangements were then made for petitioner to depart on May 19.[3] However, on May 15, his wife commenced this action by

[3] Meanwhile, Accardi moved the Board of Immigration Appeals to reconsider his case. The motion was denied on May 8.

filing a petition for a second writ of habeas corpus.[4] New grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation.[5] The principal ground is that on October 2, 1952—after the Acting Commissioner's decision in the case but before the decision of the Board of Immigration Appeals—the Attorney General announced at a press conference that he planned to deport certain "unsavory characters"; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied "that the decision

[4] *Res judicata* does not apply to proceedings for habeas corpus. *Salinger* v. *Loisel*, 265 U. S. 224 (1924); *Wong Doo* v. *United States*, 265 U. S. 239 (1924).

[5] The first ground was that "in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F. 2d 897, 901. Another allegation charged "that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained in a confidential file. Although the petition does allege that "because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the "confidential list" discussed in the body of the opinion. Hence we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the "confidential list" caused the Board to deny discretionary relief.

was based on information outside of the record" and contended that the allegation of prejudgment was "frivolous," the same counsel repeated in a colloquy with the court a statement he had made at the first habeas corpus hearing—"that this man was on the Attorney General's proscribed list of alien deportees."

District Judge Clancy did not order a hearing on the allegations and summarily refused to issue a writ of habeas corpus. An appeal was taken to the Court of Appeals for the Second Circuit with the contention that the allegations required a hearing in the District Court and that the writ should have been issued if the allegations were proved. A majority of the Court of Appeals' panel thought the administrative record amply supported a refusal to suspend deportation; found nothing in the record to indicate that the administrative officials considered anything but that record in arriving at a decision in the case; and ruled that the assertion of mere "suspicion and belief" that extraneous matters were considered does not require a hearing. Judge Frank dissented.

The same questions presented to the Court of Appeals were raised in the petition for certiorari and are thus properly before us. The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto.

Regulations[6] with the force and effect of law[7] supplement the bare bones of § 19 (c). The regulations

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[6] The applicable regulations in effect during most of this proceeding appear at 8 CFR Pts. 150 and 90 (1949) and 8 CFR Pts. 150, 151 and 90 (1951 Pocket Supp.). The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR Pts. 242–244 and 6 (Rev. 1952).

[7] See *Boske* v. *Comingore*, 177 U. S. 459 (1900); *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 155 (1923); *Bridges* v. *Wixon*, 326 U. S. 135, 150–156 (1945).

prescribe the procedures to be followed in processing an alien's application for suspension of deportation. Until the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General—hearing officer, Commissioner, and the Board of Immigration Appeals. The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General. . . ." 8 CFR § 90.3 (c) (1949). See 8 CFR § 6.1 (d)(1) (Rev. 1952). And the Board was required to refer to the Attorney General for review all cases which:

> "(a) The Attorney General directs the Board to refer to him.
>
> "(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.
>
> "(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees." 8 CFR § 90.12 (1949). See 8 CFR § 6.1 (h)(1) (Rev. 1952).

The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General;

the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of "unsavory characters" whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General "planned to deport." And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the "Attorney General's proscribed list of alien deportees." To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens." It would be naive to expect such a heavy handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred." We believe the allegations are quite sufficient where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated,

announced, and circulated such views of the pending proceeding.

It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.

If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.[8] Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Reversed.

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[8] See the *Bilokumsky* and *Bridges* cases cited in note 7, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 366.—October Term, 1953.

United States of America, ex rel. Joseph Accardi, Petitioner, *v.* Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service, New York District, Department of Justice.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 15, 1954.]

Mr. Justice Jackson, whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Minton join, dissenting.

We feel constrained to dissent from the legal doctrine being announced. The doctrine seems proof of the adage that hard cases make bad law.

Peculiarities which distinguish this administrative decision from others we have held judicially reviewable must be borne in mind. The hearings questioned here as to their fairness were not hearings on which an order of deportation was based and which, under some limitations, may be tested by habeas corpus. *Ekiu* v. *United States*, 142 U. S. 651. Neither is this a case involving questioned personal status, as whether one is eligible for citizenship, which we have held reviewable under procedures for declaratory judgment and injunction. *McGrath* v. *Kristensen*, 340 U. S. 162. Petitioner admittedly is in this country illegally and does not question his deportability or the validity of the order to deport him. The hearings in question relate only to whether carrying out an entirely legal deportation order is to be suspended.

Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analagous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control; and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended. Even if petitioner proves himself eligible for suspension, that gives him no right to it as a matter of law but merely establishes a condition precedent to exercise of discretion by the Attorney General. Habeas corpus is to enforce legal rights, not to transfer to the courts control of executive discretion.

The ground for judicial interference here seems to be that the Board of Immigration Appeals did find, or may have found, against suspension on instructions from the Attorney General. Even so, this Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision. The refusal to suspend deportation, no matter which subordinate officer actually makes it, is in law the Attorney General's decision. We do not think its validity can be impeached by showing that he overinfluenced members of his own staff whose opinion in any event would be only advisory.

The Court appears to be of the belief that habeas corpus will issue to review a decision by the Board. It is treating the Attorney General's regulations as if they vested in the Board final authority to exercise his discre-

tion. But, in our view, the statute neither contemplates nor tolerates a redelegation of his discretion by the Attorney General so as to make the decision of the Board, even if left standing by him, final in the sense of being subject to judicial review as the Board's own decision. Even the Attorney General was not entrusted with this discretion free of all congressional control, for Congress specifically reserved to itself power to overrule his acts of grace. 54 Stat. 672, 8 U. S. C. (1946) § 155 (c), as amended, 8 U. S. C. (Supp. V) § 155 (c). It overtaxes our naïveté about politics to believe Congress would entrust the power to a board which is not the creature of Congress and whose members are not subject to Senate confirmation.

Cases challenging deportation orders, such as *Bridges* v. *Wixon*, 326 U. S. 135, whatever their merits or demerits, have no application here. In cases where the question is the validity of a deportation order, habeas corpus will issue at least to review jurisdictional questions. In those cases, also, the petitioner has a legal right to assert, *viz.*, a private right not to be deported except upon grounds prescribed by Congress. Neither the validity of deportation nor a private right is involved here.

Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by overissue quite as certainly as by too niggardly use. We would affirm and leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it.